83-1563 (1)

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No. 83-

In The

Supreme Court of the United States

October Term, 1983

FRANK WILLS, Petitioner

v.

STATE OF GEORGIA, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF GEORGIA

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QUESTIONS PRESENTED

I. WHETHER THE TRIAL JUDGE'S EXPLICIT RELIANCE UPON A PRIOR UNCOUNSELED MISDEMEANOR CONVICTION IN IMPOSING A MAXIMUM SENTENCE ON PETITIONER IS INCOMPATIBLE WITH THE RESULT IN BALDASAR V. ILLINOIS, 446 U.S. 222 (1980)?

II. WHETHER THE PROCEDURAL POSTURE OF THE CASE AT TRIAL AND BEFORE THE COURT OF APPEALS SHOULD PRECLUDE A GRANT OF THE WRIT OF CERTIORARI?

TABLE OF CONTENTS

	Page
Opinions Below	2
Jurisdiction	2
Statement of Case	3
Reason For Granting Writ of Certiorari	6
Conclusion	32

APPENDIX

Supreme Court of Georgia; order of January 19, 1984 denying writ of certiorari	A-1
Court of Appeals of Georgia; order of December 12, 1983 denying petition for re-hearing	A-2
Court of Appeals of Georgia; opinion of November 23, 1983 in Wills v. State (not yet officially reported)	A-3
State Court of Richmond County, Georgia; order of May 11, 1983 denying petitioner's Motion and Amended Motion for New Trial	A-12
Excerpt from petitioner's Amended Motion for New Trial; filed in State Court of Richmond County, Georgia	A-14

Page

Judgment of Conviction for Shoplifting; Recorder's Court, City of North Augusta, South Carolina; September 17, 1979 (single document displayed on consecutive pages) A-17,18

Excerpt from transcript below of petitioner's sentencing on February 15, 1983 for theft by taking (shoplifting) in the State Court of Richmond County, Georgia A-19

Official Code of Georgia, sections 16-8-2 and -12; theft by taking provision and penalty applicable to that offense A-21

Code of Laws of South Carolina 1976, section 13-13-110; shoplifting provision in effect at time of petitioner's September 17, 1979 shoplifting conviction in North Augusta, South Carolina . A-22

TABLE OF AUTHORITIES

	Page
Argersinger v. Hamlin, 407 U.S. 25 (1972)	8
Baldasar v. Illinois, 446 U.S. 222 (1980)	6,7, 10
Burgett v. Texas, 389 U.S. 109 (1967)	7,9, 14, 22
Chambers v. Mississippi, 410 U.S. 284, 290 (1973)	30
Creswill v. Grand Lodge, Knights of Pythias of Georgia, 225 U.S. 246 (1912)	31
Gideon v. Wainwright, 372 U.S. 335 (1963)	7
Hathan v. Lovorn, 457 U.S. 255, 261-65 (1982)	30
Hollingsworth v. State, 410 So.2d 133 (Ala. 1981)	16,21
LaBarre v. Daneault, 461 A.2d 89 (N.H. 1983)	20
Lewis v. United States, 445 U.S. 55 (1980)	9
Loper v. Beto, 405 U.S. 473 (1972)	8,9

Page

McClure v. Commonwealth,
283 S.E.2d 224 (Va. 1981) 20

McKenney v. State,
388 So.2d 1232 (Fla. 1980) 17

NAACP v. Alabama ex rel. Patterson,
357 U.S. 449, 457-58 (1958) 30

People v. Hampton,
619 P.2d 48 (Colo. 1980) 16

People v. McCarty,
101 Ill. App.3d 355, 429 N.E.2d
1382 (1981) 17

People v. Rocha,
659 P.2d 569 (Colo. 1982) 16

Schindler v. Clerk of Circuit
Court,
715 F.2d 341, 344-46 (7th Cir.
1983) 18

Scott v. Illinois,
440 U.S. 367 (1979) 8,13

Smith v. State,
248 Ga. 828, 286 S.E.2d 709
(1982) 20

State v. Boos,
232 Kan. 864, 659 P.2d 224
(1983) 20

State ex rel. Bishop v. Blackburn,
384 So.2d 406, 408 (1980) 22

State ex rel. Alton v. Conklin,
421 So. 1108 (Fla. App. 1982) . . . 17

State v. Gerwin,
69 Ohio St.2d 488, 432 N.E.2d
828 (1982) 20

Page

State v. Grenvik,
291 Or. 99, 628 P.2d 1195
(1981) (In banc) 18,22

State v. Harder,
650 P.2d 724 (Kan. App. 1982) . . . 17,21

State v. Hinson,
164 Ga. App. 66, 296 S.E.2d
386 (1982) 26

State v. Hooker,
131 Ariz. 480, 642 P.2d 477 (1982). 20

State v. Levey,
445 A.2d 1089 (N.H. 1982) 21

State v. Nordstrom,
331 N.W.2d 901 (Minn. 1983) 17,21

State v. Novak,
107 Wis.2d 31, 318 N.W.2d 364
(1982) 18

State v. Orsini,
187 Conn. 264, 445 A.2d 887
(1982) 21

State v. Smith,
213 Neb. 446, 329 N.W.2d 564
(1983) 18,21

State v. Sweeney,
190 N.J. Super. 516 (N.J. App.
Div. 1983) 20

State v. Ulibarri,
96 N.M. 511, 632 P.2d 746 (1981) . 18

Page

State v. Vainio,
466 A.2d 471 (Me. 1983) 20

State v. Wiggins,
399 So.2d 206 (La. 1981) 17

Street v. New York,
394 U.S. 576 (1969) 28

Thompson v. Estelle,
642 F.2d 996 (5th Cir. 1981) . . . 19

Tucker v. United States,
404 U.S. 443 (1972) 7,9,
14,15

United States v. Rice,
671 F.2d 455 (11th Cir. 1982) . . . 19

United States v. Robles-Sandoval,
637 F.2d 692, 693 n. 1 (9th
Cir. 1981) 18

Vachon v. New Hampshire,
414 U.S. 478 (1974) 29

Wade v. State,
231 Ga. 131, 200 S.E.2d 271 (1972). 26

Ward v. Board of County Commissioners
of Love County,
253 U.S. 17 (1920) 31

Williams v. Georgia,
349 U.S. 375, 383 (1955) 30

Wilson v. Estelle,
625 F.2d 1158 (5th Cir. 1980),
cert. denied, 451 U.S. 912 (1981) . 19

Page

Wright v. Georgia,
373 U.S. 284, 291 (1983) 30

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PETITION FOR A WRIT OF CERTIORARI
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Frank Wills respectively petitions this Court to issue a writ of certiorari to review the judgment of the Court of Appeals of the State of Georgia entered November 23, 1983. (A-3) This petition comes after the Supreme Court of Georgia denied certiorari to the petitioner on January 19, 1984. (A-1)

OPINION BELOW

The opinion of the Court of Appeals of Georgia (A-3) is not officially reported at this time.

JURISDICTION

The judgment of the Court of Appeals of the State of Georgia was entered on November 23, 1983. A timely petition for rehearing was denied on December 12, 1983. (A-2) Thereafter, on December 30, 1983, a timely application for a writ of certiorari was filed with the Supreme Court of Georgia. On January 19, 1984 the Supreme Court of Georgia denied Mr. Wills' request for certiorari. (A-1) Jurisdiction of this Court to review the judgment of the Court of Appeals of the State of Georgia is conferred by 28 U.S.C. §1257(3).

STATEMENT OF CASE

Petitioner was convicted of theft by taking (shoplifting) in a jury trial on February 14 and 15, 1983 in the State Court of Richmond County, Georgia. The item taken was a pair of tennis shoes valued at $16.79. At sentencing the trial judge asked whether the petitioner had "any previous record." (A-19) The prosecutor responded by presenting "for sentencing purposes, a certified copy of [a] conviction from the North Augusta City Recorder's Court . . . for the offense of shoplifting." (A-19) The date of this prior conviction was September 17, 1979. (A-17,18)

For some reason, the trial judge did not make the tendered prior conviction a part of the record at that point. In any event, the trial judge specifically relied on the prior conviction to impose a sentence on petitioner of twelve months (A-20), the maximum penalty possible for the offense

which is a misdemeanor under Georgia law. O.C.G.A. §§16-8-2 and 16-8-12. (A-21)

At sentencing, petitioner's trial counsel did not object to the trial judge's consideration of the North Augusta shoplifting conviction. Trial counsel, however, filed a timely motion and amended motion for a new trial. (A-14,15,16) One contention in that motion was that petitioner's sentence was illegal because the North Augusta shoplifting conviction was uncounselled and could not be used to enhance petitioner's sentence. (A-14,15)

Attached to this motion as Exhibit "B" was a copy of the docket entry for petitioner's North Augusta shoplifting conviction. (A-17,18) It reflected the following information:

(1) the charge of shoplifting;

(2) petitioner's plea of nolo contendere;

(3) the court's finding of guilt;

(4) a sentence of 30 days in jail or payment of a $108.25 fine. (A-22)

In the space for the name of the defendant's attorney, there was no entry. The docket entry was also silent as to whether the defendant waived his right to the presence of counsel or any other trial rights that he possessed.

The trial judge set the motion for hearing and argument on April 21, 1983. No transcript was made of that proceeding. On May 21, 1983, the trial judge denied petitioner's motion and amended motion for new trial. (A-12) Encompassed within this order was a rejection of petitioner's challenge to the legality of his twelve month sentence.

REASONS FOR GRANTING WRIT OF CERTIORARI

I. INTRODUCTION

The ultimate question presented by this petition requires consideration of the scope of Baldasar v. Illinois, 446 U.S. 222 (1980), a decision regarded by many lower courts as having no clear rationale. Can a trial judge explicitly consider and rely upon an uncounseled prior misdemeanor conviction to increase a sentence of confinement in a subsequent criminal case when the uncounseled prior misdemeanor conviction did not result in incarceration? To reach this question, however, the Court must first consider three preliminary issues: (1) whether the burden was on the state initially to establish the constitutional propriety of reliance upon the petitioner's prior shoplifting conviction in sentencing?; (2) if so, whether the state satisfied its burden by tendering a certi-

fied copy of a prior judgment of conviction which was silent concerning whether the petitioner was represented by counsel?; (3) whether the Court of Appeals denied petitioner due process and equal protection when it refused to consider petitioner's challenge to the legality of his sentence?

II. THE TRIAL JUDGE'S EXPLICIT RELIANCE UPON A PRIOR UNCOUNSELED MISDEMEANOR CONVICTION IN IMPOSING A MAXIMUM SENTENCE ON PETITIONER IS INCOMPATIBLE WITH THE RESULT IN BALDASAR V. ILLINOIS, 446 U.S. 222 (1980) AND PRESENTS AN OCCASION FOR THIS COURT TO CLARIFY THE RATIONALE OF THAT DECISION.

After Gideon v. Wainwright, 372 U.S. 335 (1963), the Supreme Court addressed a series of questions concerning the secondary use of prior uncounseled felony convictions. In Burgett v. Texas, 389 U.S. 109 (1967), the Court held that a conviction which was invalid under Gideon could not be used for enhancement purposes under the Texas recidivist statute. In Tucker v. United States, 404 U.S. 443 (1972), the Court held

that such a conviction could not even be considered by a court in sentencing a defendant after a later conviction. Finally, in Loper v. Beto, 405 U.S. 473 (1972), the Court ruled that a conviction obtained in violation of Gideon could not be used for the purpose of impeaching the general credibility of the defendant. After Argersinger v. Hamlin, 407 U.S. 25 (1972), the rationale of these post-Gideon decisions necessitated similar restrictions on the use of prior uncounseled misdemeanor convictions at least in those cases in which defendant received a sentence of imprisonment.

In Scott v. Illinois, 440 U.S. 367 (1979), however, the Supreme Court brought a halt to the expansion of the Sixth Amendment right to counsel. It held that as long as a defendant was not sentenced to a term of imprisonment, an uncounseled conviction did not violate the sixth amendment. But Scott did not settle the point whether

convictions that were valid under its rationale were valid for other purposes such as sentence enhancement in a later case involving a term of imprisonment.

Two decisions since Scott have considered the secondary use of uncounseled prior convictions. First, in Lewis v. United States, 445 U.S. 55 (1980), the Court upheld a firearms possession conviction under 18 U.S.C. 1202(a)(1). An element of the government's proof under the statute was that the defendant possessed a firearm after having been previously convicted of a felony. Without disclaiming the reasoning or results in its prior decisions concerning the use of uncounseled prior felony convictions, Loper v. Beto, 405 U.S. 473 (1972); United States v. Tucker, 404 U.S. 443 (1972); Burgett v. Texas, 389 U.S. 109 (1967), the Court reasoned that Congress had not intended to make criminal liability under section 1202

dependent upon the underlying validity of the prior felony conviction. Rather, a prior felony conviction under section 1202 was seen as a rational indicator of a person's dangerousness and thus justified the general firearms ban applicable to all convicted felons. Although the Court's ruling in Lewis rested entirely on statutory interpretation, the tone of the opinion presaged disenchantment with Loper, Tucker, and Burgett. After Lewis, one could plausibly ask why Congress could take the view that it did of prior felony convictions under section 1202, yet trial courts could not have the same latitude or discretion in sentencing?

Less than two months after Lewis, the Supreme Court addressed the question of permissible uses of uncounseled prior misdemeanor convictions for which no prison term was imposed. In Baldasar v. Illinois, 446 U.S. 222 (1980), Baldasar was charged

with the November 1975 theft of property (a showerhead) worth less than $150. This was the second such charge against Baldasar within the year. Under Illinois law, the first offense for theft of this type was treated as a misdemeanor; the second as a felony. Baldasar was convicted. At sentencing, the prosecutor asked that Baldasar's second theft conviction be treated as a felony. Over the protest of Baldasar's attorney, who pointed out that her client had been unrepresented in the first case, the trial judge sentenced the defendant as a felon, giving him one to three years in prison. The Illinois Appellate Court affirmed on the theory that even though the defendant was unrepresented in the first theft trial, Baldasar's prison term was attributable entirely to the second theft conviction.

The Supreme Court reversed in a decision that really has no majority ra-

tionale. Four justices in Baldasar (Brennan, Marshall, Stevens and Stewart) were of the opinion that had it not been for the previous theft conviction in which Baldasar was unrepresented, he would not have been treated as a felon and received the one to three year sentence that he did. In their view, an uncounseled conviction under the rationale of Scott v. Illinois was valid only for limited purposes. Id. at 224-229. Justice Marshall's concurring opinion summarized this point clearly: "[A] conviction which is invalid for the purposes of imposing a sentence of imprisonment for the offense itself remains invalid for purposes of increasing a term of imprisonment for a subsequent conviction under a repeat-offender statute." Id. at 228 (emphasis added).

Justice Blackmun provided the fifth and decisive veto in favor of reversal in Baldasar. He restated the position he took

in his Scott dissent that the right to counsel ought to attach whenever a defendant is prosecuted for an offense punishable by more than six months' imprisonment. Scott v. Illinois, 440 U.S. 367, 389-90 (1979). Since Baldasar's first theft offense carried a possible penalty of one year, Justice Blackmun found that Baldasar was in fact entitled to counsel in that trial and therefore no collateral use of his uncounseled conviction was permissible. Id. at 229-231.

Justice Powell's dissent questioned both the logic and the policy underlying the result reached by the Court. He believed that a conviction which is valid under Scott should be regarded as valid for all purposes, most particularly sentence enhancement. In his view, the Court's prior cases reflect the premise that uncounseled felony convictions are void because of their unreliability. Justice Powell did not

agree that this premise of unreliability carried over to uncounseled misdemeanor convictions. Id. at 233-34, n. 2. Finally, he perceived a "violent" conflict between the Court's reasoning in Lewis and the result reached in Baldasar. How could an uncounseled -- and therefore invalid -- felony be relied upon to sustain the firearms conviction in Lewis and yet in fixing Baldasar's sentence no consideration could be given to his prior uncounseled misdemeanor conviction which was valid as imposed?

Baldasar reflects an extension of the analysis of Burgett v. Texas, 389 U.S. 109 (1967) to uncounseled misdemeanor convictions that are constitutionally valid under Scott. The present petition in effect raises the question whether the rationale of another post-Gideon case, United States v. Tucker, 404 U.S. 443 (1972) will similarly be extended to Scott convictions. The trial judge in this case explicitly relied on

the North Augusta conviction to impose on the petitioner the maximum penalty possible under Georgia law of twelve months. The certified copy of the North Augusta conviction was blank in the space where the name of defense counsel was supposed to appear. In addition, there is no entry indicating waiver of the right to counsel. Regardless of whether the trial judge in the instant case knew these details when he sentenced petitioner to twelve months, he was made aware of them as a result of a timely post-trial motion in which the legality of petitioner's sentence was challenged.

The trial judge's sentencing here perfectly parallels the constitutionally invalid action of the trial judge in United States v. Tucker, 404 U.S. 443 (1972) except for one particular: the petitioner did not serve jail time for the North Augusta shoplifting conviction. Although Baldasar involved a statutorily mandated recharacteri-

zation of a second theft offense from misdemeanor to felony with an accompanying enhancement of penalty, it could be extended to encompass petitioner's case as well. Whether this Court would take such a step, however, depends upon reaching agreement about the underlying premise of Baldasar or perhaps reconsidering the locus of the "bright line" in the Scott decision. The absence of consensus has caused considerable difficulty in the lower federal and state courts.

Many state courts have taken the result in Baldasar at face value and have ruled that a subsequent criminal penalty cannot be enhanced based on a prior uncounseled misdemeanor conviction which did not result in imprisonment. Hollingsworth v. State, 410 So.2d 133 (Ala. 1981) (Baldasar applied in probation revocation proceeding); People v. Rocha, 659 P.2d 569 (Colo. 1982) reversed on other grounds, 669 P.2d 1366

(1983) (habitual traffic offender case); People v. Hampton, 619 P.2d 48 (Colo. 1980) (habitual traffic offender case); State ex rel. Alton v. Conklin, 421 So. 1108 (Fla. App. 1982) (Baldasar applied in proceeding to determine whether juvenile would be tried as adult); McKenney v. State, 388 So.2d 1232 (Fla. 1980) (Baldasar recognized as applicable to habitual misdemeanant charge; waiver of counsel found in prior proceeding); People v. McCarty, 101 Ill. App.3d 355, 427 N.E.2d 1382 (1981) (Baldasar applied in probation revocation proceeding); State v. Harder, 650 P.2d 724 (Kan. App. 1982) (Baldasar recognized as applicable; but waiver of counsel found in prior misdemeanor conviction); State v. Wiggins, 399 So.2d 206 (La. 1981) (cites Baldasar favorably though Louisiana followed same rule since 1974); State v. Nordstrom, 331 N.W.2d 901 (Minn. 1983) (Baldasar applied in case where enhanced punishment was fine not

a term of imprisonment); State v. Smith, 213 Neb. 446, 329 N.W.2d 564 (1983) (Baldasar applied to deny enchancement of sentence for traffic offense); State v. Ulibarri, 96 N.M. 511, 632 P.2d 746 (1981) (Baldasar followed in driving under influence case); State v. Grenvik, 291 Or. 99, 628 P.2d 1195 (1981) (In banc) (Baldasar following in driving under influence case to deny enhancement).

At the same time, perhaps an equal number of state courts and several federal circuit courts have circumvented the Baldasar decision or appear to have ignored it. A number of these decisions have pointed out the lack of any controlling rationale in Baldasar as a reason for not following it. See, e.g., Schindler v. Clerk of Circuit Court, 715 F.2d 341, 344-46 (7th Cir. 1983); United States v. Robles-Sandoval, 637 F.2d 692, 693 n. 1 (9th Cir. 1981); State v. Novak, 107 Wis.2d 31, 318 N.W.2d 364 (1982). The fifth circuit has apparently

elected to adhere to its pre-Baldasar position that uncounseled prior convictions which do not result in imprisonment are valid for all purposes. Wilson v. Estelle, 625 F.2d 1158 (5th Cir. 1980), cert. denied, 451 U.S. 912 (1981) (dismissed Baldasar with a "cf." footnote reference). See also, Thompson v. Estelle, 642 F.2d 996 (5th Cir. 1981) (cites Wilson but does not mention Baldasar). In the only eleventh circuit decision to discuss Baldasar, the court avoided the issue in a probation revocation proceeding. It held that, apart from the uncounseled misdemeanor, there was ample independent evidence in the record to justify revocation. United States v. Rice, 671 F.2d 455 (11th Cir. 1982).

In a different vein, a number of lower courts have pointed out the conflict between the Lewis and Baldasar decisions and they have relied on Lewis as a means of avoiding the ramifications of Baldasar.

See, Smith v. State, 248 Ga. 828, 286 S.E.2d 709 (1982); State v. Vainio, 466 A.2d 471 (Me. 1983); McClure v. Commonwealth, 283 S.E.2d 224 (Va. 1981). Other courts have avoided the thrust of Baldasar through unquestionably legitimate distinctions. These distinctions have turned on the civil character of the later proceeding, State v. Boos, 232 Kan. 864, 659 P.2d 224 (1983) (later proceeding civil in nature; Baldasar does not preclude consideration of uncounseled convictions in determining habitual traffic violator status); LaBarre v. Daneault, 461 A.2d 89 (N.H. 1983) (similar), as well as the fact that even if the later proceeding was criminal, the defendant did not receive a term of imprisonment. State v. Hooker, 131 Ariz. 480, 642 P.2d 477 (1982); State v. Sweeney, 190 N.J. Super. 516 (N.J. App. Div. 1983); State v. Gerwin, 69 Ohio St.2d 488, 432 N.E.2d 828 (1982). Finally, several decisions have found

Baldasar inapplicable because counsel was waived in the earlier criminal proceeding. See, e.g., State v. Harder, 650 P.2d 724 (Kan. App. 1982); State v. Levey, 445 A.2d 1089 (N.H. 1982).

Only one other point bears on the propriety of granting certiorari in this case. It has to do with burden of proof allocation. The state in this case asked the trial judge to consider a prior conviction which on its face indicated that petitioner was not represented at his shoplifting trial in North Augusta. Some jurisdictions place the burden on the state to establish the validity of any prior convictions if they are offered for consideration at sentencing. Hollingsworth v. State, 410 So.2d 133 (Ala. 1981); State v. Orsini, 187 Conn. 264, 445 A.2d 887 (1982); State v. Nordstrom, 331 N.W.2d 901 (Minn. 1983); State v. Smith, 213 Neb. 446, 329 N.W.2d 564 (1983). The decisions of this Court

also appear to place the burden of sanitizing prior convictions on the state. See, e.g., Burgett v. Texas, 389 U.S. 109 (1967).

Under this authority the state in this case could not have met its burden of proof since it never, as far as the record reflects, established that petitioner had representation at his North Augusta shoplifting trial. Indeed, the only document in the record concerning that conviction is blank in the space provided for the name of defense counsel. On its face, therefore, it is constitutionally deficient and should not have been considered by the trial judge. See, State ex rel. Bishop v. Blackburn, 384 So.2d 406, 408 (1980) (minutes of prior misdemeanor conviction indicated "waiver of counsel" but did not establish factual basis; conviction could not be used); State v. Grenvik, 291 Or. 99, 628 P.2d 1195 (1981) (abstract of prior traffic conviction blank in space for name

of defense counsel; held no waiver of counsel in face of the omission from record).

Petitioner contends that Lewis and Baldasar have produced enough difficulty in the lower courts to justify intervention by this Court. What is desperately needed in this area is the "bright line" that members of this Court have so often referred to in their opinions. As the law stands now, lower courts cannot be certain about how to consider prior uncounseled misdemeanor convictions which do not result in imprisonment. This case provides an opportunity for a clarifying ruling. The procedural considerations in the next section do not suggest otherwise.

III. THE PROCEDURAL POSTURE OF THE CASE AT TRIAL AND BEFORE THE COURT OF APPEALS SHOULD NOT PRECLUDE A GRANT OF THE WRIT OF CERTIORARI.

A. Procedural Default

At sentencing, counsel for petitioner

did not object to the trial judge's reliance on the North Augusta shoplifting conviction. (A-18,19) Under Georgia law, as will be shown, trial courts have broad authority to amend or correct illegal sentences. In this case, petitioner filed an amended motion for a new trial which contained, among other points, a request for a correction of sentence because the North Augusta conviction was uncounseled. (A-14,15) The sentencing question was brought to the attention of the trial judge in a timely manner. Furthermore, after conducting a hearing and considering argument, the trial judge rejected petitioner's motion in an order entered May 16, 1983. (A-12) Petitioner's notice of appeal to the Court of Appeals of Georgia followed on June 14, 1983.

Despite the fact that one of petitioner's enumerations of error was the denial of the amended motion for new trial, the Court of Appeals refused to consider the challenge

to the legality of the sentence. (A-9,10) Incomprehensibly, the Court treated the use of the North Augusta conviction as a question of evidentiary admissibility, subject to the contemporaneous objection rule. The confusion underlying this approach is almost beyond clarification. Two propositions appear to underly the Court of Appeals ruling: (1) since the North Augusta conviction was not formally admitted into the record, there was no harm to petitioner; and (2) since petitioner's trial counsel failed to object to the trial judge's actual consideration of the North Augusta conviction, the procedural default forever barred a challenge to the legality of the sentence.

The rationale of the contemporaneous objection rule makes considerable sense when applied to the development of a trial record before a case goes to the jury or to the court for passing judgment on the issues. But at sentencing -- which is not a part of

the same factfinding process as the trial -- the rules of evidence are relaxed. Trial judges in Georgia routinely rely on information in sentencing which would be inadmissible at trial. It is sufficient procedurally for a criminal defendant to bring a sentencing error to the trial judge's attention at a point when jurisdiction to correct a mistake still exists. Under section 17-10-1, Official Code of Georgia, the trial judge does not lose this authority until after the expiration of the term of court at which the sentence was imposed. See Wade v. State, 231 Ga. 131, 200 S.E.2d 271 (1972); State v. Hinson, 164 Ga. App. 66, 296 S.E.2d 386 (1982) (both decided under predecessor to §17-10-1; no difference in language). Therefore, even if an objection is not made at or before the moment of sentencing, the trial judge can subsequently considerly the objection under §17-10-1 and, it should be stressed, the trial judge did

so in petitioner's case below.

Perhaps in its emphasis on the failure to object, the Court of Appeals had in mind the predicate necessary under Georgia law to impeach a witness at trial by proof of prior criminal convictions. In that circumstance, if the impeachment were allowed without proper predicate, the defendant's failure to object surely would be decisive against post-trial or appellate review since the defendant's only remedy would be a new trial. A challenge to the legality of a sentence, however, entails none of those consequences and for that reason at sentencing the contemporaneous objection rule is simply beside the point under Georgia law. How else can one explain the liberal practice in Georgia permitting challenges to sentence when made during the same term of court at which the original sentence was imposed?

Contrary to what the Court of Appeals appears to have assumed, the illegality of

petitioner's sentence under Baldasar has nothing to do with the admissibility into evidence of the North Augusta conviction. As a matter of federal constitutional law, if petitioner's sentence is invalid, it is because of the trial judge's explicit consideration of information that should not have been taken into account at all. The trial judge clearly gave petitioner's North Augusta conviction weight because he stated so on the record and then imposed the maximum sentence of twelve months.

As this Court observed in Street v. New York, 394 U.S. 576 (1969):

> "The issue whether a federal question was sufficiently and properly raised in the state courts is itself a federal question, as to which this Court is not bound by the decision of the state courts." Id. at 583.

The words of petitioner's amended motion for new trial can leave no doubt that the

challenge to the sentence was based on the impropriety of the trial judge's reliance on the uncounseled North Augusta misdemeanor conviction. Petitioner's claim was surely stated with more specificity than the first amendment claim considered by this Court in Street or the due process claim in Vachon v. New Hampshire, 414 U.S. 478 (1974).

As to the timing of petitioner's challenge to the sentence, it came at a point when the trial judge had authority not only to correct any sentencing mistake but when he could have ordered a new trial! Despite that fact, the Court of Appeals treated petitioner's Baldasar claim as barred for failure to object to the use of the North Augusta conviction when it was first brought up at sentencing. This is a palpably inadequate ground for denying appellate review to the petitioner. If a state court applies its procedural rules to bar a claim either for improper reasons or in circum-

stances where the policy underlying a rule has no relevance, this Court does not defer to state law. Hathan v. Lovorn, 457 U.S. 255, 261-65 (1982); Chambers v. Mississippi, 410 U.S. 284, 290 (1973); Wright v. Georgia, 373 U.S. 284, 291 (1983); NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 457-58 (1958); Williams v. Georgia, 349 U.S. 375, 383 (1955). Petitioner cannot fathom whether any ulterior motive was behind the Court of Appeals ruling, but given the fact that the trial judge was able to consider his sentencing challenge, petitioner asks what substantial reason could the Court of Appeals have had for invoking procedural default. The contemporaneous objection rule was mentioned but petitioner has already suggested why that justification is bizarre to say the least.

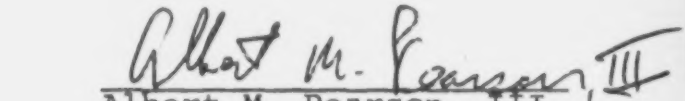
Out of an abundance of caution, perhaps, the Court of Appeals added one final reason for refusing to consider petitioner's

Baldasar claim. It asserted that the claim was raised on appeal for the first time. That assertion is flatly contradicted by the record. The trial judge considered the claim as a part of petitioner's amended motion for new trial and rejected it. Since there is no fair and substantial support in the record for the Court of Appeals' ruling, this Court can disregard it. Ward v. Board of County Commissioners of Love County, 253 U.S. 17 (1920); Creswill v. Grand Lodge, Knights of Pythias of Georgia, 225 U.S. 246 (1912). Petitioner does not contest the strong policy behind an appellate rule requiring a question to be preserved at the trial level in order to make it subject to appellate review. But, in this instance, neither the letter nor the spirit behind that rule came into play on petitioner's appeal and, for that reason, the rule cannot be an "adequate" state ground for the Court of Appeals' decision below.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that this Court grant the petition for writ of certiorari on behalf of Frank Wills.

Respectfully submitted,



Albert M. Pearson, III
University of Georgia
School of Law
Athens, Georgia 30602
(404) 542-7668

CERTIFICATE OF SERVICE

As a member of the Bar of the United States Supreme Court, I hereby certify that on this 19th day of March, 1984, three copies of the enclosed Petition for Certiorari were mailed, postage prepaid, to:

(1) Michael J. Bowers
Attorney General
State of Georgia
132 State Judicial Bldg.
40 Capitol Square, SW
Atlanta, GA 30334

(2) Gayle B. Hamrick
Solicitor of State Court
Richmond County
217 City-County Municipal Bldg.
Augusta, GA 30911

I further certify that all parties required to be served have been served.

Albert M. Pearson III

Albert M. Pearson, III
University of Georgia
School of Law
Athens, Georgia 30602
(404) 542-7668
COUNSEL FOR PETITIONER

CLERK'S OFFICE, SUPREME COURT OF GEORGIA

Atlanta 1/19/84

Case No. 40711, Wills v. The State

The Supreme Court today denied the writ of certiorari in this case. All the justices concur, except Smith, J., dissents.

Very truly yours,
S/

JOLINE B. WILLIAMS,
Clerk

COURT OF APPEALS
OF THE STATE OF GEORGIA

Atlanta 12/12/83

The Honorable Court of Appeals met pursuant to adjournment. The following order was passed:

67148 Frank Wills v. The State

Upon consideration of the motion for a rehearing filed in this case, it is ordered that it be hereby denied.

COURT OF APPEALS OF THE STATE OF GEORGIA

CLERK'S OFFICE, ATLANTA

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

CLERK

OCTOBER, 1983

AFFIRMED

67148. WILLS V. THE STATE (Bi-206)

BIRDSONG, Judge.

Frank Wills was convicted of theft by taking (shoplifting) and sentenced to serve twelve months. He brings this appeal enumerating five asserted errors.

The operative facts of this appeal indicate that Wills entered a retail establishment in Augusta with his teenage son. Wills went to the shoe department and made inquiry about a certain style tennis shoe and its price. Subsequently, Wills and his son began to exit the store, passing by the cash register without making payment for any purchases. A security employee was standing near the register talking with another employee. It was her responsibility to check all packages not

originating in the store in question. Wills passed by the register and moved to within a few feet of the exit doors when the security employee called him back to the checkout counter stating that she had to check all packages. Though the testimony is disputed, the jury was warranted in believing that the employee looked into a "tote" bag being carried by Wills and found therein a pair of tennis shoes of the type about which Wills had made an inquiry. The shoes were the merchandise of the store and still contained intact a tag that would have been separated had a proper purchase been made. When confronted with the shoes, Wills asked how much he had to pay. Initially the store manager was going to allow Wills to pay for the shoes but upon learing of his conduct in the store, Wills was detained and subsequently arrested. Held:

1. During the presentation of the state's evidence, the prosecutor inquired why the store manager offered Wills the opportunity to purchase the shoes. This question was objected to by the defense as tending to bolster the testimony of a state's witness. In overruling the objection, the trial court stated to the defendant's counsel that there was no purpose in keeping the reason a secret or for not letting it in so that the jury could weigh it in their deliberations. After further argument, the trial court sustained the objection and told the jury the question and answer were not to be considered by them and expressly charged the jury that it was not to place any credence to the question because of the comments made by the court to counsel in the discussion of the objection.

It is clear that the trial court merely explained his reasoning to counsel for the court's ruling. Remarks of a judge assigning a reason for his ruling are neither an expression of opinion nor a comment on the evidence. Johnson v. State, 246 Ga. 126, 128 (V) (269 SE2d 18). Moreover, the trial court sustained the objection, removed the consideration of the subject from the jury and gave an appropriate charge thereon. Under such circumstances, it is not error for the trial court to refuse to grant a mistrial. Jones v. State, 139 Ga. App. 643, 644 (229 SE2d 121). There is no merit in the first enumeration of error.

2. Likewise during its case in chief, the state asked the store manager how many cases of shoplifting he had experienced. This question was objected to on the grounds of irrelevance. As subsequent testimony

from this witness demonstrated, the state offered the evidence to indicate that it was not unusual for a shoplifter to offer to pay for the merchandise after detection. Also the evidence was offered to show that the conduct of the manager after Wills' detection was identical to his conduct in other cases of shoplifting. For either of these reasons, it was not error for the question to be asked nor the answer to be given. Any evidence is relevant which logically tends to prove or to disprove a material fact which is at issue in the case, and every act or circumstance serving to elucidate or to throw light upon a material issue or issues is relevant. Harris v. State, 142 Ga. App. 37, 41 (234 SE2d 798).

3. Wills also urges error in the limitation by the trial court of the scope of his cross examination. During the

examination of the employee who searched Wills' tote bag, counsel for Wills asked her to repeat her direct testimony of the stop and search of Wills. When she had completed that statement, counsel asked her, over objection, to again repeat the story, presumably to see if her testimony would be consistent. As soon as she had repeated the testimony she was asked to tell it again. On this third occasion, the trial court sustained the objection made by the state.

Cross examination may be curtailed if the subject matter is repetitious as to matter already developed on cross examination. Thompson v. State, 166 Ga. 758 (10) (144 SE 301). Moreover, prejudice must be shown by its exclusion. Freeman v. State, 230 Ga. 85 (1) (195 SE2d 416); Hudson v. State, 137 Ga. App. 439, 440 (224 SE2d 48).

We discern no abuse of discretion in the situation nor has appellant shown any prejudice.

4. Wills had testified that he stopped at the register counter, removed the shoes from the bag and had money in his hand to pay for the shoes. He was asked whether he could really dispute the testimony of the employee who found the shoes who had stated that Wills had proceeded past the counter and was three or four feet from the exit of the store when he was called back. Appellant urges error in the question asking him to explain the other witness' testimony. Actually the transcript shows that the original question was never answered. The state rephrased the question and the answer thereto was given without objection. We will not grant a new trial for the simple asking of a question that was not answered, especially

where the substance of the question is subsequently posed and answered without objection. Moreover, the question properly served to attack the veracity and credibility of appellant's testimony on this subject, an area certainly within the appropriate scope of cross examination. We find no abuse of discretion in the action of the trial court in allowing the evidence. Mitchell v. State, 236 Ga. 251, 256 (223 SE2d 650); Bailey v. State, 138 Ga. App. 807, 808 (227 SE2d 516).

5. In his last enumeration, Wills complains the trial court erred in considering a previous conviction which is not shown in the record to have been attended by counsel. The transcript reflects that the state presented to the court a certified copy of an earlier conviction for shoplifting. The document was not offered into evidence and was not formally admitted,

thus it is not a part of the record. Likewise the record reflects that appellant was shown the certified copy of the prior conviction but made no objection to the admissibility of the document on any ground, nor did appellant voice any objection to a consideration by the trial court in the sentencing process. That being so, appellant is not entitled to raise this issue for the first time on appeal and thus presents nothing in this context for this court to review. McKisic v. State, 238 Ga. 644 (5) (234 SE2d 908); Copeland v. State, 160 Ga. App. 786, 789 (12) (287 SE2d 120).

Judgment affirmed. Shulman, C.J., and McMurray, P.J., concur.

IN THE STATE COURT OF

RICHMOND COUNTY, GEORGIA

STATE OF GEORGIA	)	
	)	
vs.	)	CASE NO. A-125296
	)	
FRANK WILLS	)	

ORDER DENYING MOTION FOR NEW TRIAL
AND AMENDED MOTION FOR NEW TRIAL

A hearing for a Motion For New Trial and Amended Motion for New Trial having come on for a hearing before the Honorable James E. Slaton, Judge of the State Court of Richmond County, Georgia on April 21, 1983, and after hearing argument from both counsels,

IT IS THEREFORE, ORDERED AND ADJUDGED that the defendant's Motion For New Trial and Amended Motion For New Trial is denied.

This 16th day of May, 1983.

S/
JUDGE JAMES E. SLATON
JUDGE, STATE COURT
RICHMOND COUNTY, GA

PRESENTED BY:

S/
GAYLE B. HAMRICK, SOLITICOR
STATE COURT, RICHMOND COUNTY, GA

IN THE STATE COURT OF RICHMOND COUNTY

STATE OF GEORGIA

THE STATE OF GEORGIA	)
	)
vs.	)
	)
FRANK WILLS	)

AMENDED MOTION FOR NEW TRIAL

NOW COMES FRANK WILLS, hereinafter referred to as Movant, and respectfully shows:

. . .

-2-

The Court erred in sentencing Movant to a term of twelve months because such conviction was allegedly Movant's second offense in that:

(a) The Court erred in considering evidence of an alleged prior offense when his counsel had not been previously apprised of such (see Exhibit "B" attached hereto and by reference made a part hereof);

(b) The Court erred in considering an alleged second offense when it was unclear whether Movant was the same person as included in the previous offense;

(c) The Court erred in considering an alleged second offense when it was unclear whether Movant was represented by counsel in the previous case; and

(d) The Court erred in failing and refusing to exercise discretion in the sentencing process.

. . .

. . .

. . .

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. . .

. . .

. . .

WHEREFORE, Movant prays that his Motion for New Trial, as amended, be granted.

This ____ day of April, 1983

Respectfully submitted,

S/_____
JOHN H. RUFFIN, JR.
COUNSEL FOR MOVANT
1101 ELEVENTH STREET
AUGUSTA, GEORGIA 30901

This is to certify that I have this day served counsel for the opposing party in the foregoing matter with a copy of this pleading by depositing in the United States Mail a copy of same in a properly addressed envelope with adequate postage thereon.

This ____ day of _____, 19__

_____
Counsel for

PERSON(s) SERVED:

Mr. Gayle B. Hamrick
Solicitor, State Court
Richmond County, Georgia
Richmond, Georgia 30911

CITY OF NORTH AUGUSTA

South Carolina

RECORDER'S COURT

DOCKET

Docket No.: 29673

Citation No.: GK 3639

Name: Frank NMN Wills N/M
DOB: 2-4-48

Address: 204 Five Notch Spur

Charge: Shoplifting (First)

Date of Violation: 9-05-79
Time: 6:50 PM

Location of Violation: Harris Teeter

Defendant Plea		Disp. of Court	
Guilty	( )	Guilty	( )
Not Guilty	( )	Not Guilty	( )
Nolo Contendere	( )	Nolle Prossed	( )
		Sent to Higher Court	
Request Jury	( )		
		Bond Forfeit	( )

A-17

Date of Trial: 9-17-79 Bond: $108.25

Officer: PSO Mosley

Witness:

Defendant Atty.:

PAID TO CITY TREASURER

Cashiers Stamp

Fine: $108.25 Or 30 Days

Susp. $_____ And __Days

____ Days on Public Works

S/_____

Recorder's Signature

EXHIBIT "B"

TRANSCRIPT EXCERPT -- SENTENCING

THE COURT: All right, Mr. Hamrick, does the defendant have any previous record?

MR. HAMRICK: Yes, Your Honor.

THE COURT: All right, read it out to the Court.

MR. HAMRICK: Let me tender it to defense counsel, Your Honor.
We will present, for sentencing purposes, a certified copy of conviction from the North Augusta City Recorder's Court imposed on September 17, 1979 for the offense of shoplifting.

THE COURT: In North Augusta?

MR. HAMRICK: Yes, sir.

THE COURT: When did that happen?

MR. HAMRICK: The date of the offense was September of 1979, the date of trial September 17, 1979.

THE COURT: Would you like to make any comments before sentencing on behalf of your client?

MR. JAMES: We don't have anything to say at this time, Your Honor.

THE COURT: All right, in view of your record of shoplifting, I sentence you to twelve months in the Richmond County Correctional Institution.

TRIAL CONCLUDED

OFFICIAL CODE OF GEORGIA

Offenses Involving Theft

§16-8-2. Theft by Taking.

A person commits the offense of theft by taking when he unlawfully takes or, being in lawful possession thereof, unlawfully appropriates any property of another with the intention of depriving him of the property, regardless of the manner in which the property is taken or appropriated.

§16-8-12. Penalties For Violation of Code Sections 16-8-2 Through 16-8-9.

A person convicted of violation of Code Sections 16-8-2 through 16-8-9 shall be punished as for a misdemeanor except:

(1) If the property which was the subject of the theft exceeded $200.00 in value, by imprisonment for not less than one nor more than ten years or, in the discretion of the trial judge, as for a misdemeanor;

. . .

CODE OF LAWS OF SOUTH CAROLINA 1976

§16-13-110. Shoplifting.

(A) A person is guilty of shoplifting if he:

(1) Takes possession of, carries away, transfers from one person to another or from one area of a store or other retail mercantile establishment to another area, or causes to be carried away or transferred any merchandise displayed, held, stored or offered for sale by any store or other retail mercantile establishment with the intention of depriving the merchant of the possession, use or benefit of such merchandise without paying the full retail value.

(2) Alters, transfers or removes any label, price tag marking, indicia of value or any other markings which aid in determining value affixed to any merchandise displayed, held, stored or offered for sale in a store or other retail mercantile establish-

ment and attempts to purchase such merchandise personally or in consort with another at less than the full retail value with the intention of depriving the merchant of the full retail value of such merchandise.

(3) Transfers any merchandise displayed, held, stored or offered for sale by any store or other retail mercantile establishment from the container in which it is displayed to any other container with intent to deprive the merchant of the full retail value.

(B) Any person violating the provisions of this section shall be deemed guilty of a misdemeanor and upon conviction shall be punished in accordance with the following:

(1) By a fine of not more than six hundred dollars or imprisonment for not more than six months, or both, for the first offense. Provided, however, that if the value of the shoplifted merchandise is less

than fifty dollars, the punishment shall be a fine of not more than one hundred dollars or imprisonment for not more than thirty days.

(2) By a fine of not more than one thousand dollars or imprisonment for not more than one year, or both, for a second offense.

(3) By imprisonment for not less than one year nor more than five years for a third or subsequent offense.

HISTORY: 1978 Act No. 507 §2, eff May 30, 1978.